PUNCAK NIAGA (M) SDN BHD A

v.

KERAJAAN NEGERI SELANGOR

HIGH COURT MALAYA, KUALA LUMPUR B
LEE HENG CHEONG JC
[CIVIL SUIT NO: 24NCVC-369-02-2013]
1 OCTOBER 2013

CIVIL PROCEDURE: *Originating summons - Striking out - Application for - Suit against public authority - Whether agreements enforceable under Water Services Industry Act 2006 ('WASIA') - Whether ss. 173, 191 WASIA applicable - Whether originating summons an abuse of court process - Rules of the Court 2012, O. 53* C

CIVIL PROCEDURE: *Striking out - Application for - Rules of Court 2012 ('ROC'), O. 18 r. 19 - Inherent jurisdiction of court - Suit against public authority - Non-compliance of O. 53 ROC - Whether dispute a matter of public or private law - Whether originating summons an abuse of court process* D

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The defendant applied to strike out the plaintiff's originating summons ('OS') under O. 18 r. 19(1)(a) of the Rules of Court 2012 ('ROC') and/or the inherent jurisdiction of the court ('encl. 6'). The basis of the defendant's application was that the OS and the plaintiff's affidavit No. 1 disclosed no reasonable cause of F action. Briefly, the facts were that upon the approval of Majlis Mesyuarat Kerajaan Negeri Selangor, the plaintiff was awarded concession for the operation and maintenance ('O&M') of Sungai Sireh water treatment plant ('WTP') for a period of 27 years. Two subsequent agreements were then executed, the O&M G agreement and the novation agreement ('the agreements'). However, prior to their execution, the Water Services Industry Act 2006 ('WASIA') came into force on 1 January 2008. The National Water Services Commission ('SPAN') subsequently informed the defendant that the agreements could not be registered as they H were not in compliance with s. 173 of the WASIA and required the parties to submit a draft of re-negotiated agreements for SPAN's approval. In spite of the demand by SPAN, the plaintiff averred that s. 173 was not applicable and the agreements ought to be registered under s. 191 of the WASIA. Thereafter, the I

defendant informed the plaintiff that it had overlooked the provisions of s. 173 and took the position that the O&M agreement was cancelled as it was unenforceable and requested the WTP be handed over to Konsortium Air Selangor Bhd. As a result, the defendant's decision was met by protest from the plaintiff, which sought action by way of OS seeking, *inter alia*, the following reliefs, *ie*, (i) a declaration that the agreements were valid and enforceable pursuant to WASIA; and (ii) an order against the defendant for specific performance of the agreements. The defendant contended that the plaintiff's action was to be struck out as it was a suit filed against a public authority on a matter of public law and that the plaintiff failed to comply with O. 53 of the ROC. However, the plaintiff contended that encl. 6 under limb (a) of O. 18 r. 19 of the ROC was plainly misconceived in law and should be dismissed *in limine*. Further, the plaintiff submitted that their remedies lie in private law despite the defendant, being a public body, having made a decision, first to enter into the agreements and then to cancel it based on its reading of s. 173 of the WASIA. Hence, the issue that arose was whether on a true and correct interpretation of s. 173 of the WASIA, the agreements were enforceable due to non-registration under WASIA.

Held (striking out plaintiff's suit):

(1) Based on the reading of s. 173 of the WASIA, the dispute between the plaintiff and the defendant was in public and not private law on the grounds that the legal source of the defendant's power to terminate the agreements was found in public domain. Further, the defendant was sued in its capacity as a public authority, as the State Government of Selangor. (para 19)

(2) The defendant's decision to terminate the agreement was because the agreements were unenforceable due to the plaintiff's non-compliance with the WASIA and/or because the WTP was operating without any legal basis, which had direct public consequences to the residents of Selangor, Kuala Lumpur and Putrajaya since the plaintiff operated a WTP to treat raw water and supply treated water to the defendant for distribution to the said residents. (para 19)

(3) The plaintiff could not register the agreements under s. 191 of the WASIA because the agreements were not listed in Sch. 2 on 1 January 2008 as the agreements were only executed on 7 March 2008. Thus, the plaintiff was operating the WTP without any authorisation under the WASIA and it was therefore in violation of s. 191(1). (para 19)

(4) The plaintiff was seeking, *inter alia,* for specific performance in the OS but in essence it was a mandamus order which should only be sought pursuant to Chapter VIII of the Specific Relief Act 1950. The court is barred from granting an order for specific performance against a State Government and *in lieu* may only make an order declaratory of rights of the parties pursuant to s. 29 of the Government Proceedings Act 1956. Hence, the defendant was prejudiced because it was deprived of the filter process as a form of mandatory procedure. (para 19)

[5] It is mandatory for the plaintiff to have filed a judicial review under O. 53 of the ROC since the defendant is a public authority exercising functions and powers with a strong public element and utility. The plaintiff in filing the action *via* an OS instead of an application for judicial review under O. 53, was circumventing the requirements of O. 53 namely, the leave requirement in O. 53 r. 3(1) and the time limitation in O. 53 r. 3(6). Further, the OS was an abuse of process that necessitated a striking out under O. 18 r. 19 or inherent jurisdiction of the court. (paras 20, 25 & 27)

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(foll)***

Bandar Builder Sdn Bhd v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Indah Desa Saujana Corp Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor [2005] 4 CLJ 925 ***(refd)***

Jalang Paran & Anor v. Government of the State of Sarawak & Anor [2011] 3 CLJ 469 CA ***(refd)***

Merdeka University Berhad v. Government of Malaysia [1982] 1 LNS 1 SC

O'Reilly v. Mackman [1983] 2 AC 237 ***(refd)***

Raja Zainal Abidin Bin Raja Haji Tachik & 3 Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC ***(refd)***

Robert Cheah Foong Chiew v. Lembaga Jurutera Malaysia [2009] 1 CLJ 192 CA ***(refd)***

Zainal Abidin Hamid & Ors v. Kerajaan Malaysia & Ors [2009] 6 CLJ 683 CA ***(refd)***

Legislation referred to:
Federal Constitution, arts. 80(1), 160
Government Proceedings Act 1956, s. 29(1)(a)
Laws of the Constitution of Selangor 1959, art. 50
Rules of Court 2012, O. 18 r. 19(1)(a), (3), (d), O. 53(1)(2), r. 3(6), O. 92 r. 4
Water Services Industry Act 2006, ss. 173(1), (6), 191(1)

For the plaintiff - Ravindran Shanmuganathan (Hassan Mohamed & Nasuhah Mohamed Ali with him); M/s Sreenavasan Young
For the defendant - Edmund Bon Tai Soon; M/s Chooi & Company

Reported by Shah Saharuddin

JUDGMENT

Lee Heng Cheong JC:

Introduction

[1] This is an application by the defendant to strike out the plaintiff's originating summons dated 15 June 2013 (OS) pursuant to O. 18 r. 19(1)(a) Rules of Court 2012 and/or the inherent jurisdiction of the court (encl. 6) on the ground that the OS and the plaintiff's affidavit No. 1 discloses no reasonable cause of action against the defendant. The defendant's said application herein sought the following reliefs:

(a) The plaintiff's OS be struck out pursuant to O. 18 r. 19(a) of the Rules of Court 2012 and/or the inherent jurisdiction of the court;

(b) The plaintiff pays the defendant costs relating to defendant's application to strike out the plaintiff's OS; and

(c) Any other reliefs that this Honourable Court deems fair and appropriate to grant.

Undisputed Facts

[2] On or about 15 December 2004, the Government of Malaysia, the State Government of Selangor Darul Ehsan ("defendant") and Syarikat Bekalan Air Selangor Sdn Bhd ("SYABAS") entered into a concession agreement dated

15 December 2004 ("concession agreement") in respect of the grant of the concession for the supply and distribution of treated water in Selangor and the Federal Territories of Kuala Lumpur and Putrajaya. Clause 3(a)(vi) thereof provides the defendant and the plaintiff would execute a supplemental agreement whereby the plaintiff would take over the operation and maintenance of the Sungai Sireh water treatment plant ("WTP").

[3] By a letter dated 25 April 2007, the Selangor State Economic Planning Unit informed the plaintiff that the Majlis Mesyuarat Kerajaan Negeri Selangor had, at its meeting on 11 April 2007 ("11 April 2007 meeting"), decided to approve the award of the concession for the operation and maintenance of the WTP to the plaintiff for a period of 27 years from 1 April 2007 until 30 April 2034 and that a formal agreement to that effect would be executed. The plaintiff accordingly took over the operation and maintenance of the WTP on 1 April 2007.

[4] Subsequently, two agreements were executed on 7 March 2008 which were as follows:

(a) Sungai Sireh Water Treatment Plant Operation and Maintenance Agreement ("O&M Agreement") between the defendant and the plaintiff; and

(b) Novation Agreement to the Sungai Sireh Water Treatment Plant Operation and Maintenance Agreement ("Novation Agreement") between the defendant, the plaintiff and SYABAS.

[5] The O&M and Novation Agreements ("agreements"), despite being dated 7 March 2008, nonetheless provide (at cls. 2 and 4 respectively) that they are to have retrospective effect from 1 April 2007.

[6] However, prior to the execution of the agreements, the Water Services Industry Act 2006 ("WASIA") had come into force on 1 January 2008.

[7] By a letter dated 24 April 2008, the defendant informed the plaintiff that it had overlooked the provisions of s. 173 of WASIA prior to the execution of the O&M Agreement on 7 March 2008 and accordingly took the position that the performance of the agreements "hendaklah ditangguhkan dan dikaji semula sehingga SPAN mengendorskan perjanjian berkenaan."

[8] Soon thereafter, the National Water Services Commission ("SPAN"), by its letter dated 22 May 2008, informed the defendant that the agreements could not be registered as they were not in compliance with s. 173 of WASIA. SPAN required the defendant and the plaintiff to renegotiate the agreements to bring them in line with the objectives of the Act and thereafter to submit a draft of the renegotiated agreements for SPAN's approval.

[9] The plaintiff disagreed and by a letter dated 2 March 2009, the plaintiff took the position that the said s. 173 was not applicable to the factual matrix at hand and that the agreements ought to be registered under s. 191 of WASIA.

[10] The deadlock between the plaintiff and the defendant continued until December 2012. By a letter dated 4 December 2012, the defendant took the position that the O&M Agreement was "dibatalkan" as it was unenforceable pursuant to WASIA and requested that the operations and management of the plant be handed over to Konsortium Air Selangor Berhad ("defendant's decision") which was met by a protest from the plaintiff *vide* its letter dated 8 January 2013.

The Plaintiff's Case

[11] In this OS, the plaintiff seeks the following reliefs:

(a) A declaration that the O&M Agreement and the Novation Agreement are valid and enforceable pursuant to WASIA;

(b) An order against the defendant for specific performance of the agreements;

(c) Costs; and

(d) Further or other reliefs that this Honourable Court deems just and fit.

[12] The plaintiff's claim in the OS is grounded on the decision made by the defendant on 4 December 2012 to terminate the agreements ("the defendant's decision").

[13] The plaintiff contends that the defendant's said application herein is flawed and in any event, the plaintiff's remedy lies in private law.

The Defendant's Case

[14] The defendant contends that the plaintiff's action is to be struck out as it is a suit filed against a public authority on a matter of public law and the plaintiff has failed to comply with O. 53 of the Rules of Court 2012.

Consideration Of The Application

[15] From the pleadings, the affidavits and written submissions of the parties, the dispute is one between the plaintiff and the defendant, two contracting parties as to whether, on true and correct interpretation of s. 173 of the Water Services Industry Act 2006 (WASIA), the agreements are enforceable due to non-registration under the Water Services Industry Act 2006 (WASIA).

[16] The plaintiff contends that the defendant's application [encl. 6] under limb (a) of O. 18 r. 19 Rules of Court 2012, is plainly misconceived in law and should be dismissed *in limine* and the defendant ought moved under O. 18 r. 19(d) ROC for "abuse of process". The plaintiff further contended that the plaintiff states that their remedies lies in private law notwithstanding the defendant, although a public body, made a decision, as a contracting party, first to enter into the agreements and then to "batalkan" the agreements based on its reading of s. 173 of the Act.

[17] Addressing the plaintiff's contention that the defendant's application [encl. 6] under limb (a) of O. 18 r. 19 Rules of Court 2012, is plainly misconceived in law and should be dismissed *in limine*, this court notes and finds that this court is not prevented from hearing the defendant's application for striking out the plaintiff's OS for abuse of process under the court's inherent jurisdiction pursuant to O. 92 r. 4 ROC. The Supreme Court in the case of *Raja Zainal Abidin bin Raja Haji Tachik & 3 Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606 at p. 611; [1993] 3 MLJ 16 held at pp. 23-24 as follows:

> It is to be remembered that the High Court always has an inherent jurisdiction to prevent abuse of its process irrespective of whether it is expressly called for or not in an application under O. 18 r. 19 unless such application is limited solely to the ground that any pleading does not disclose a reasonable cause of action or defence as the case may be.

[18] Further, O. 18 r. 19(3) Rules of Court 2012 provides that r. 19 is to be applied to originating summons, as far as applicable. Rule 19(3) was interpreted in the case of *Zainal Abidin Hamid & Ors v. Kerajaan Malaysia & Ors* [2009] 6 CLJ 683; [2009] 6 MLJ 863, where the Court of Appeal held at p. 690 (CLJ); 871 (MLJ) as follows:

> [13] In civil litigation, abuse of process constitutes a ground empowering the court, at any stage of the proceedings, to strike out or amend any pleading or endorsement of any writ in the action under O. 18 r. 19(1)(d), or under the court's inherent jurisdiction housed in O. 92 r. 4: see Malaysian Court Practice MLJ 2007 Desk Edition at p. 247 para. 18.19.7. **Under O. 18 r. 19(3), the OS is treated as if it were a pleading for the purposes of O. 18 r. 19(1)**. The court has an inherent jurisdiction to prevent an abuse of its process: *Raja Zainal Abidin bin Raja Hj Tachik & 3 Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606; [1993] 3 MLJ 16; [1993] 2 AMR 2073 (SC). (emphasis added)

[19] As regards the plaintiff's other contention that the plaintiff's remedies lies in private law notwithstanding the defendant, being a public body, had made a decision, as a contracting party, first to enter into the agreements and then to "batalkan" the agreements based on its reading of s. 173 of the Act, this court finds as follows:

(i) That the dispute between the plaintiff and the defendant parties is in public and not private law based on the following grounds:

(a) The legal source of the defendant's power to terminate the agreements is found in legislation/statute ie, in the public domain. Guidance can be found in the followings:

(i) In *Dato' Seri Anwar Ibrahim v. Perdana Menteri Malaysia & Anor* [2007] 3 CLJ 377; [2007] 4 MLJ 422, the Court of Appeal held that the suit raised public law issues as it challenged a decision and action taken by the Prime Minister pursuant to provisions of the Federal Constitution. In other words, the legal source of the powers being impugned was in the public domain. The court *inter alia* held that failure to file a judicial review under O. 53 was fatal, and at p. 436 said:

[41] This suit raises public law issues as it is a decision and action taken by the Prime Minister in pursuance of the provisions of the Federal Constitution that is being impugned. As such a decision taken by the Prime Minister with regard to a Minister as a member of the administration in his public duties is one which has implications for the public as a whole and it is in consequence of this that the public law is concerned with the decision making process. The legal sources of the powers that are being impugned are in the public domain. As such to institute the proceedings by ordinary summons, though seemingly appearing to be simple in procedure, will deprive the public authority in this case the Federal Government and in the circumstances of the present case, of the protection of the law that it is entitled to by the processes available under O. 53.

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[43] For the reasons elaborated above I have found that the suit is ill founded, constituting a misuse of the processes of court and therefore unsustainable.

(ii) Article 80 of the Federal Constitution provides for the executive authority of the defendant as the Government of the State of Selangor and the defendant's executive powers are contained in the State and Concurrent List of the Federal Constitution. Article 80 states as follows:

80. Distribution Of Executive Powers

(1) Subject to the following provisions of this Article the executive authority of the Federation extends to all matters with respect to which Parliament may make laws, and the executive authority of a State to all matters with respect to which the Legislature of that State may make laws.

(2) The executive authority of the Federation does not extend to any matter enumerated in the State List, except in so far as is provided in Articles 93 to 95, nor to any matter

A enumerated in the Concurrent List, except in so far as may be provided by Federal or State law; and so far as Federal or State law confers executive authority on the Federation with respect to any matter enumerated in the Concurrent List it may do so to the exclusion of the executive authority of the State.

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(3) So far as a law made under Clause (4) of Article 76 makes provisions for conferring executive authority on the Federation it shall not operate in any State unless approved by resolution of the Legislative Assembly of that State.

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(iii) The State List under the Ninth Schedule of the Federal Constitution provides in para. 6 as follows:

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6. State works and water, that is to say:

(a) Public works for State purposes;

(b) Road, bridges and ferries other than those in the Federal List, regulation of weight and speed of vehicles on such roads; and

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(c) Subject to the Federal List, water (including rivers and canals but excluding water supplies and services); control of silt; riparian rights.

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(iv) The Concurrent List under the Ninth Schedule of the Federal Constitution provides in para. 9D as follows:

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D. Subject to Federal List, water supplies and services.

Thus, the legal source of the defendant's executive powers to terminate the agreements which are being challenged by the plaintiff is found in the public domain.

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(v) The defendant's decision to terminate the Agreements was further made in exercise of its powers vested with the Selangor Executive Council (EXCO) pursuant to art. 80(1) Federal Constitution

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read with the State List and Concurrent List and also art. 50 of the Laws of the Constitution of Selangor 1959 which states as follows:

50. Executive Authority

> The executive authority of the State shall be vested in His Highness and exercisable, unless provided by the Federal Constitution or this Constitution, by him or by the State Executive Council or any member of the State Executive Council authorised by the State Executive Council, but executive functions may by law be conferred on other persons or authorities.

(b) The defendant is sued in its capacity as a public authority ie, as the Selangor State Government.

(i) Article 160 of the Federal Constitution provides that the Government of a State (ie, the defendant) exercising powers vested in it Federal or State law is a public authority. It states as follows:

> "public authority" means the Yang di-Pertuan Agong, the Ruler or Yang di-Pertua Negeri of a State, the Federal Government, the Government of a State, a local authority, a statutory authority exercising powers vested in it by Federal or State law, any court or tribunal other than the Federal Court, the Court of Appeal and High Courts, or any officer or authority appointed by or acting on behalf of any of those persons, courts, tribunals or authorities.

(ii) In *Merdeka University Berhad v. Government of Malaysia* [1982] 1 LNS 1; [1982] 2 MLJ 243, the Supreme Court also held at p. 250 as follows:

> The operative word in the definition in Article 160(2) must necessarily be the word "authority", and for a person or body to constitute such as entity there must be some public element and utility in its constitution, operation, functions, powers and duties ... A university established under the 1971 Act even if private clearly has the requisite public element, as it is subject to some degree of public control in its affairs and involves a number of public appointments to office in its framework, acts in the public interest and is eligible for grants-in-aid from public funds.

(iii) Since the agreements relate to a public element and utility which is the supply and distribution of raw and treated water to the residents of Selangor, the Federal Territory of Kuala Lumpur and the Federal Territory of Putrajaya, this court finds that the defendant's decision was made in exercise of its public function, power and duty. Further the agreements involved the payment of public funds to the plaintiff for the purchase of bulk water treated by the plaintiff and the defendant was exercising its executive powers as the Government of the State of Selangor, in entering into the agreements with the plaintiff.

(c) The defendant's decision to terminate the agreements was because the agreements were unenforceable due to the plaintiff's non-compliance with WASIA and/or because the WTP was operating without any legal basis, has the following direct public consequences to the residents of Selangor, the Federal Territory of Kuala Lumpur and the Federal Territory of Putrajaya since the plaintiff operates a WTP to treat raw water and supply treated water to the defendant for distribution to the said residents.

(i) This court finds that it is not disputed that the provision of water supplies and services in Malaysia is governed by the WASIA. Section 173 of WASIA applies to the plaintiff ie, the plaintiff must register the agreements with SPAN pursuant to s. 173(1) WASIA failing which it would be unenforceable under s. 173(6) of the WASIA. Section 173 of the WASIA is reproduced here:

> Registration of agreements
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> 173. (1) The written agreements referred to in sections 32 and 53 shall be submitted to the Commission for registration.
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> (2) A person who wishes to enter into an agreement as referred to in subsection (1) shall submit the finalized draft of the written agreement to the Commission for endorsement.
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> (3) If the Commission is satisfied that the finalized draft agreement submitted to it under subsection (2) is consistent with this

Act or its subsidiary legislation, the Commission shall endorse the finalized draft agreement and the person may enter into the written agreement on the same terms as the endorsed draft agreement and shall submit the written agreement to the Commission for registration.

(4) The Commission shall register any written agreement submitted to it under subsection (3).

(5) Where the parties to a written agreement referred to in subsection (1) chooses to enter into the written agreement prior to the Commission endorsing the written agreement, the parties to the agreement shall make provisions in the written agreement to the effect that the written agreement is only effective upon the Commission registering the written agreement.

(6) A written agreement referred to in subsection (1) shall only be enforceable upon its registration.

(7) The Commission shall register the written agreement if the Commission is satisfied that the agreement is consistent with this Act or its subsidiary legislation.

(8) The Commission shall maintain a register of all agreements registered under this section in accordance with section 176.

(9) The register shall contain:

(a) the names of the parties to the agreement;

(b) a general description of the matter pertaining to the agreement; and

(c) the date of the agreement, except the terms and conditions of the agreement.

(10) A copy of the written agreement shall be deposited with the Commission.

(ii) As regards the plaintiff's contention that the Agreements ought to be registered under s. 191 of the WASIA, this court finds that the plaintiff cannot register the Agreements under s. 191 of the WASIA because the Agreements were not listed in Sch. 2 of the WASIA on 1 January 2008 as the Agreements were only executed on 7 March 2008 thus the plaintiff is currently operating the WTP without any authorisation under WASIA and therefore in violation of s. 191(1) of WASIA. Section 191 of WASIA is reproduced here:

Agreements stipulated in the Schedule

191. (1) A person listed out as an authorized person in column (1) of the Schedule shall only be authorized to carry out the services and activities stipulated in the agreement and supplementary agreement set out opposite his name in column (2) of the Schedule for a period of three months from the appointed date or such other period as may be extended by the Commission unless the person lodges a certified true copy of the agreement and supplementary agreement with the Commission within such period or extended period.

(2) Notwithstanding subsection (1), the authorized person who lodges a certified true copy of the agreement and supplementary agreements with the Commission under subsection (1) shall continue to be authorized under this section until the expiry of a period of two years or such other period as may be extended by the Commission after the appointed date.

(3) The authorization granted to the persons authorized under subsection (1) shall lapse if they fail to register with the Commission within three months or the extended period after the appointed date.

(4) The person authorized under subsection (1) shall as soon as possible after lodging his agreement and supplementary agreements, but in any event not later than three months

after the lodgement date, commence renegotiation of his agreement and supplementary agreement with the Federation and the other counter parties to the agreement and supplementary agreement so as to address any national interest issues arising from the coming into operation of this Act.

(5) The determination of what amounts to national interest issues arising from the coming into operation of this Act shall be made by the Minister and such determination shall be final and binding upon all persons and shall not be challenged, appealed against, reviewed, quashed or questioned in any court.

(6) Upon the finalization of the renegotiated agreement or supplementary agreement effecting the amendments, if any, the Commission shall register the amended agreements notwithstanding s. 173.

(7) Notwithstanding the provisions of this Act, any other written law or any rule of law or contract, the failure of a person authorized under subsection (1) to commence renegotiation of his agreement and supplementary agreement as required under subsection (4) shall be a ground for the authorization referred to in subsection (1) to be revoked or for a licence under this Act not to be granted to such person.

(8) If an authorization has been revoked under subsection (7) or if a grant of licence is refused on the ground specified in subsection (7), the Federal Government, Minister or Commission shall not be liable:

(a) to pay any compensation to; and

(b) for any loss or damage suffered or incurred by, the person affected by the revocation of the authorization or the refusal of the grant of licence.

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(9) If a person's authorization is revoked under subsection (7) or the person has been refused a licence on the ground specified in subsection (7), the Minister shall exercise his powers under s. 114 and all provisions relating to s. 114 shall apply accordingly. [Emphasis added]

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(d) The plaintiff is seeking *inter alia* for specific performance in the OS but in essence it is a mandamus order and this court is barred from granting an order for specific

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performance against a State Government and *in lieu* may only make an order declaratory of the rights of the parties pursuant to s. 29 of the Government Proceedings Act 1956 ["GPA"]. Section 29(1)(a) of the GPA states as follows:

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Nature of relief

29. (1) In any civil proceedings by or against the Government the court shall, subject to this Act, have power to make all such orders as it

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has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:

Provided that:

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(a) where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties;

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... (emphasis added)

Since this court finds that the plaintiff's prayer for specific

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performance is essence is akin to an order of mandamus which should only be properly sought pursuant to Chapter VIII of the Specific Relief Act 1950 (SRA) which is also subject to O. 53 as stated in O. 53(1)(2), the defendant as the State Government is thus therefore prejudiced

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because it is deprived of the filter process as a form of mandatory procedure pursuant to O. 53 if this action proceeds by way of OS.

(e) This court is further guided by the case of *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865; [2010] 3 MLJ 145, is instructive of the approach that the English courts and Malaysian courts have taken in making a distinction between a public law matter from a private one. In paras. 22-30, James Foong FCJ held:

> *[22] It is widely accepted that not every decision made by an authoritative body is suitable for judicial review. To qualify there must be a sufficient public law element in the decision made. For this, it is necessary to examine both the source of the power and the nature of the decision made; whether the decision was made under statutory power (see para. 61 Halsbury's Laws of England, 4th edn, 2001 Reissue, vol. 1(1)). To illustrate this, we will refer to a number of authorities involving dismissal from service by a public authority or a purported public authority;*
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> [23] In *R v. East Birkshire Health Authority, Ex parte Walsh* [1985] 1QB 152, the applicant was a senior nursing officer employed by the respondent under a contract of service. He was dismissed by the respondent's district head nursing officer for misconduct. He applied for judicial review under O. 53 for an order of *certiorari* to quash the dismissal. The respondent raised a preliminary issue as to whether the appellant is entitled to apply for judicial review since the dispute is a private law matter involving the dismissal of a servant by a master. Being a private law matter, judicial review is not appropriate. The High Court dismissed the preliminary objection based primarily on this ground:
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> > The public may have no interest in the relationship between the servant and master in an 'ordinary' case, but where the servant holds office in a great public service, the public is properly concerned to see that the authority employing him acts towards him lawfully and fairly. It is not a pure question of contract. The public is concerned that the nurses who serve the public should be treated lawfully and fairly by the public authority employing them ...

[24] This decision was overturned in the Court of Appeal where Sir John Donaldson MR, delivering one of the three judgments of the court declared:

> ... Employment by a public authority does not *per se* inject any element of public law. Nor does the fact that the employee is a "higher grade" or is an "officer". This only makes it more likely that there will be special statutory restrictions upon dismissal, or other underpinning of his employment: see per Lord Reid in *Malloch v. Aberdeen Corporation*, at p. 1582. It will be this underpinning and not the seniority which injects the element of public law. Still less can I find any warrant for equating public law with the interest of the public. If the public through Parliament gives effect to that interest by means of statutory provisions, that is quite different, but the interest of the public *per se* is not sufficient. The ordinary employer is free to act in breach of his contracts of employment and if he does so his employee will acquire certain private law rights and remedies in damages for wrongful dismissal, compensation for unfair dismissal, an order for reinstatement or re-engagement and so on. Parliament can underpin the position of public authority employees by directly restricting the freedom of the public authority to dismiss thus giving the employee "public law" rights and at least making him a potential candidate for administrative law remedies. Alternatively it can require the authority to contract with its employees on specified terms with a view to the employee acquiring "private law" rights under the terms of the contract of employment. If the authority fails or refuses to thus create "private law" rights for the employee, the employee will have "public law" rights to compel compliance, the remedy being mandamus requiring the authority so to contract or a declaration that the employee has those rights. If, however, the authority gives the employee the required contractual protection, a breach of contract is not a matter of "public law" and gives rise to no administrative law remedies.

[25] So based largely on the fact that the respondent was given the right to enter into a contract of employment with the applicant, which includes the right of

dismissal, the Court of Appeal found no public law element in the applicant's complaint to entitle him to the administrative remedies sought in the judicial review.

[26] *But if there is a special statutory provision bearing directly upon the right of a public authority to dismiss the plaintiff then this may inject in the element of public law to attract the remedies provided under administrative law.* This is elaborated by Sir John Donaldson MR in the same case (*R v. Berks Authority, Ex p Walsh*) where he said:

> In all three cases there was a special statutory provision bearing directly upon the right of a public authority to dismiss the plaintiff. In *Vine v. National Dock Labour Board* [1957] AC 488 the employment was under the statutory dock labour scheme and the issue concerned the statutory power to dismiss given by that scheme. In *Ridge v. Baldwin* [1964] AC 40 the power of dismissal was conferred by statute: s. 191(4) of the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50). In *Malloch v. Aberdeen Corporation* [1971] 1 WLR 1578 again it was statutory: section 3 of the Public Schools (Scotland) Teachers Act 1882 (45 & 46 Vict. c. 18). As Lord Wilberforce said, at pp. 1595-1596, it is the existence of these statutory provisions which injects the element of public law necessary in this context to attract the remedies of administrative law ...

[27] Soon after the Court of Appeal decision in *R v. East Birkshire Health Authority, Ex parte Walsh* (*supra*), the High Court in another case *R v. Home Secretary, Ex parte Benwell* [1985] 1 QB 554, decided that a public servant who was dismissed by the authority was amenable for judicial review under O. 53. But here the distinction is on the performance of the respondent's duty imposed in part by statute. To fully appreciate this distinction, we append below the facts of this case:

[28] The complaint was a prison officer. He was charged for disobeying orders contrary to certain paragraphs of the Code of Discipline for Prison Officers. The officer, who held the disciplinary enquiry recommended that the applicant be severely reprimanded. The prison

department did not accept this recommendation and instead gave the applicant notice of its intention to dismiss him. The applicant then appealed and eventually the Secretary of State decided that the applicant should be dismissed. The applicant applied for judicial review and for an order of *certiorari* to quash the decision of the State Secretary.

[29] And this is what the High Court found:

> In this case, however, it is my opinion that in making a disciplinary award of dismissal, the Home Office (to use a comprehensive term to include the department and the Secretary of State so distinguished by the respondent itself in this case) was performing the duties imposed upon it as part of the statutory terms under which it exercises its power. I conclude therefore that this court in the exercise of its supervisory jurisdiction can come to the aid of the applicant in this case and I am glad that it can.

[30] This principle was subsequently reiterated by Lord Wolf in *McLaren v. The Home Office* [1990] ITLR 338 where he declared:

> There can however be situations where an employee of a public body can seek judicial review and obtain a remedy which would not be available to an employee in the private sector. This will arise where there exists some disciplinary or other body established under the prerogative or by statute to which the employer or the employee is entitled or required to refer dispute affecting their relationship. (emphasis added)

(f) The Federal Court in *Ahmad Jefri Mohd Jahri* (*supra*) stated that the use of the applicable procedure is very much fact based and would only succeed where the public law element is predominant. James Foong FCJ stated at para. [62] as follows:

> We observed that a challenge on the use of appropriate procedure is very much fact based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on

> substantive principles of public law then the appropriate process should be by way of O. 53 of the RHC. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has substantial public law element then the procedure under O. 53 of the RHC must be adopted. Otherwise it may be set aside on ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action under O. 53 of the RHC is not suitable. Aside from this, there could be other circumstances like the kind in YAB Dato' Dr Zambry. Much depends on the facts of the case.

(g) The Federal Court also stated that not every decision made by a public body is amenable to judicial review and laid down the following guidelines. James Foong FCJ said, at para. [21] as follows:

> In view of this, let us begin by first asking ourselves a preliminary question: is the appellant's complaint or grievance amenable for judicial review (before even considering whether the procedure adopted by him is appropriate)? If his complaint is not amenable for judicial review then he can commence his action by writ or originating summons. So first we have to determine the parameter of matters amenable for judicial review. It is widely accepted that not every decision made by an authoritative body is suitable for judicial review. To qualify there must be sufficient public law element in the decision made. For this, it is necessary to examine both the source of the power and the nature of the decision made; whether the decision was made under a statutory power (see para. 61 *Halsbury's Laws of England* (4th Edn, 2001 Reissue) Vol. 1(1)).

[20] In the light of the above, this court finds that it is mandatory for the plaintiff to have filed a judicial review procedure under O. 53 ROC since the defendant is a public authority exercising functions and powers with a strong public element and utility and the agreements sought to be enforced by the plaintiff are matters with a public element and utility to the affected residents thus the plaintiff ought to have brought a judicial review procedure *vide* O. 53. Failure to do so is fatal and will result in a striking out of the action as the filter process under O. 53 has not been adhered to. The following authorities are clear on this point.

[21] In the case of *O'Reilly v. Mackman* [1983] 2 AC 237, four plaintiffs who were prisoners in Hull Prison, were charged with disciplinary offences before the board of visitors to the prison. In the case of each plaintiff the board held an inquiry found the charges proved and imposed penalties. Three of the plaintiffs brought actions by writ in the Queen's Bench. Lord Diplock sitting in the House of Lords held in pp. 284-285 as follows:

> Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained upon an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.
>
> My Lords, I have described this as a general rule; for though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons. Whether there should be other exceptions should, in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis.

[22] In the case of *Ahmad Jefri Mohd Jahri (supra)*, the appellant was a Government officer attached to the Ministry of Culture, Art and Tourism who sued the respondents *via* a writ of summons seeking *inter alia* a declaration that his dismissal by the respondents was void and with no effect. The Federal Court struck out the suit because it did not adhere to O. 53 and James Foong FCJ *inter alia* held at p. 897 as follows:

> [61] ... However, O. 53 RHC sets out a specific procedure for an aggrieved party seeking relief, incorporating a declaration (as provided by s. 41 of the Specific Relief Act) against a public authority for infringement of his rights to which he was entitled to be protected under public law, to follow. It is our view that when such an explicit procedure is created

(as compared to a general provision set out under O. 15 r. 16 RHC) to cater for this purpose, then as a general rule all such application for such relief must commence according to what is set down in O. 53 RHC, otherwise it is liable to be struck off for abusing the process of the court.

...

[62] We observed that a challenge on the use of appropriate procedure is very much fact based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O. 53 RHC. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has a substantial public law element then the procedure under O. 53 RHC must be adopted. Otherwise, it may be set aside on the ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action under O. 53 RHC is not suitable.

[23] In the case of *Jalang Paran & Anor v. Government of the State of Sarawak & Anor* [2011] 3 CLJ 469; [2011] 3 MLJ 13, the plaintiffs were natives of Sarawak who challenged a Ministerial direction pursuant to the Land (Extinguishment of Native Customary Rights) (Pulpwood Mill Site at Ulu Batang Tatau) (No 3) Direction 1997. The direction was made by the Minister of Resource Planning of the Sarawak Government and purported to extinguish the plaintiffs' native customary rights. The plaintiffs did not proceed by way of judicial review. The Court of Appeal held at p. 482 (CLJ); p. 24 (MLJ) as follows:

[37] The Federal Court had lately in *Ahmed Jefri bin Mohd Jahri @ Md Johari v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145; [2010] 5 CLJ 865 reiterated that matters which have substantial public law element should be proceeded upon through the mechanism as provided for by O. 53 RHC for otherwise it would be rendered redundant.

...

[40] In our view the Ministerial direction is very much in the realm of public law and any challenge thereto must be pursued through the procedures as laid down by O. 53 the RHC.

A Similarly in this action, the decision to terminate the Agreements was made by the Defendant which substantially involved a question of public law.

[24] In the Court of Appeal decision of *Robert Cheah Foong Chiew v. Lembaga Jurutera Malaysia* [2009] 1 CLJ 192; [2009] 1 MLJ 676, the appellant herein applied by way of originating summons for various declarations against the respondent as a public authority for taking disciplinary action against him. He also sought an injunction to restrain the respondent from proceeding with the charge against him. The Court of Appeal held at p. 199 (CLJ); p. 682 (MLJ) as follows:

[16] ... We are of the view that the prayers sought by the appellant involve principally and primarily public law rights rather than private law rights. When they overwhelmingly concern public law rights, then the correct approach should be by way of judicial review under O. 53 of the RHC rather than by way of originating summons.

[25] In the light of the above, this court finds that the plaintiff in filing this action *via* an OS instead of an application for judicial review under O. 53, is circumventing the requirements of O. 53 namely, the leave requirement in O. 53 r. 3(1) and the time limitation in O. 53 r. 3(6). Further this OS is an abuse of process that necessitates a striking out under O. 18 r. 19 or inherent jurisdiction of the court.

[26] On an application to strike out under O. 18 r. 19(1)(a) of the Rules of Court 2012 only the facts pleaded in the OS can be relied on as no evidence is admissible. See *Indah Desa Saujana Corp Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor* [2005] 4 CLJ 925.

[27] Based on the foregoing, this court finds that the plaintiff's suit discloses no reasonable cause of action and is further an abuse of court process, and ought to be struck out under O. 18 r. 19(1)(a) and/or the inherent jurisdiction of the court. It is settled principles the OS here should only be struck out if it is obviously unsustainable. This court is guided by *Bandar Builder Sdn Bhd v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 in which Mohamed Dzaiddin bin Hj Abdullah SCJ held as follows:

The principles upon which the Court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) Rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck v.Wilkinson* (1899) I QB 86, p. 91) and this summary procedure can only be adopted when it can be easily seen that a claim or answer is on the face of it "obviously unsustainable" (*Attorney-General of Duchy of Lancaster v. L&NW Ry Co* (1892) 3 Ch 274, CA).

Order

[28] In the premises, this court grants an order in terms of encl. 6 with costs.